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SUPREME COURT, U.S.

No. 06- 291

IN THE

Supreme Court of the United States

MONTANA BOARD OF INVESTMENTS,

Petitioner,

v.

DEUTSCHE BANK SECURITIES, INC.,

Respondent.

On Petition For A Writ of Certiorari
To The New York State Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Larry H. Krantz
Counsel of Record
Wendy Gerstmann
KRANTZ & BERMAN LLP
Attorneys for Respondent
757 Third Avenue, 25th Floor
New York, New York 10017
212-661-0009

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QUESTION PRESENTED

Whether this Court should disregard principles of *stare decisis* and grant certiorari for the purpose of overruling its decision in *Nevada v. Hall*, when that decision has been relied upon by this Court, lower courts and contracting parties since it was decided in 1979, and in that time no decision of any court has challenged the soundness of its holding or urged its overruling?

RULE 29.6 STATEMENT

The following are the corporate parents of Deutsche Bank Securities Inc., a nongovernmental corporate party: Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation.

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PRELIMINARY STATEMENT

More than twenty five years ago, in *Nevada v. Hall*, 440 U.S. 410 (1979), this Court resolved an important question of interstate relations and squarely held that the United States Constitution does not confer immunity on States in the courts of their sister States. Rather, the Court held that respect between States is governed by the principle of interstate comity.

The Montana Board of Investments ("MBOI"), a subdivision of the State of Montana, now asks this Court to overrule *Hall* and radically rewrite the law of interstate sovereign immunity to require that one State *must* yield to a demand for immunity by a sister State. MBOI seeks this extraordinary relief in order to set aside a determination by the New York State Court of Appeals that MBOI—while acting in a purely commercial capacity as a seller of securities—breached its written contract with Respondent, a New York financial services company.

MBOI's Petition should be rejected because:

(1) MBOI's claim that it enjoys absolute immunity from suit in the courts of a sister State was squarely and correctly rejected by this Court more than 25 years ago in *Nevada v. Hall*, wherein this Court held that such a rule was not implicit in the Constitution and would be an affront to the sovereignty of the forum State;

(2) MBOI is ill-suited to seek reversal of *Hall*'s holding because it was well-aware that it was not immune from suit in New York when it voluntarily projected itself into that State as a commercial actor and breached a contract with Respondent, and this Court should not retroactively alter

the legal assumptions underlying the parties' contractual relationship;

(3) *Hall*'s continued vitality is clear because this Court has restated and relied upon the holding in *Hall* multiple times in the past twenty five years—including just three years ago in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003)—and Petitioner cites no opinion of this Court or any other court questioning the continued validity or wisdom of *Hall*;

(4) MBOI has not provided any compelling reason to cast aside the *stare decisis* effect of *Hall*; and

(5) *Hall* has been relied upon by the business community and States for over twenty five years in entering into contractual relationships, such as the one at issue in this case, and that reliance should not be disturbed.

Accordingly, we respectfully submit that MBOI's petition for certiorari should be denied.

STATEMENT OF THE CASE

1. While MBOI has made much of this case, it is a simple breach of contract action. Specifically, MBOI is an agency of the State of Montana charged with investing and managing state funds, including purchasing and selling securities. App. 42-43. MBOI manages over $1 billion in funds and regularly engages in multi-million dollar securities transactions. MBOI deals directly with various financial institutions and brokerage firms located in New York, New York. App. 5, n.2.

2. Respondent Deutsche Bank Securities Inc. ("DBSI") is a corporation with headquarters located in New York. It

is engaged in the business of, among other things, trading securities for its own account and on behalf of its clients.

3. In March 2002, MBOI and DBSI entered into a series of negotiations regarding the sale and purchase of Pennzoil bonds. App. 2-3. The negotiations were conducted in real-time via instant messaging over the Bloomberg message system. As a result of those negotiations, MBOI agreed to sell and deliver to DBSI $15 million in Pennzoil Bonds.

4. The following day, MBOI informed DBSI that it was going to "break the trade" and would not deliver the bonds to DBSI. App. 2-3. MBOI reneged on the trade based on the groundless accusation that DBSI must have traded on inside information, because of a merger announcement regarding Pennzoil made shortly after the trade.

5. When MBOI persisted in its refusal to perform its part of the bargain, DBSI filed a single count civil complaint against MBOI in New York Supreme Court alleging a breach of contract claim. App. 3. DBSI's Complaint alleged damages of approximately $1.6 million. MBOI asserted a number of affirmative defenses including lack of personal jurisdiction, insider trading, sovereign immunity and comity. App. 74-79.

6. On the issue of sovereign immunity, MBOI conceded that it had waived any such immunity in breach of contract cases, *see* Montana Code 18-1-404, but contended that it had done so only to the extent that such suits were brought in the Montana State courts, based on a venue limitation statute enacted along with Montana's statutory waiver of sovereign immunity. *See* Montana Code18-1-401.[1] The

[1] Montana Consolidated Code section 18-1-404 provides, in part: "(1)(a) The state of Montana is liable in respect to any contract entered

court determined that MBOI was not subject to personal jurisdiction in New York and granted judgment in favor of MBOI. App. 29-36.

7. On DBSI's appeal, the New York Appellate Division for the First Department unanimously reversed the trial court and held that MBOI was subject to personal jurisdiction in New York. App. 14-24. The First Department also rejected MBOI's defenses of insider trading, comity and sovereign immunity and entered judgment on liability in favor of DBSI.

8. On MBOI's appeal, the New York Court of Appeals affirmed the decision of the First Department and rejected MBOI's defenses. App. 1-13. The New York Court of Appeals recognized that the transaction at issue in this case was both centered in New York and wholly commercial in nature because (a) MBOI sold $15 million par value of bonds to DBSI knowing that DBSI was a large financial institution located in New York; (b) MBOI willingly and purposefully projected itself into New York by virtue of its electronic communications to enter New York's commercial arena; and (c) the injury was sustained in New York. The Court further held that MBOI intentionally projected itself into New York to take advantage of New York's unique commercial resources, and thus, should be

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into in the same manner and to the same extent as a private individual under like circumstances, except the state of Montana is not liable for punitive damages." Mont. Code Ann. § 18-1-404. Section 18-1-401, provides: "The district courts of the state of Montana shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim or dispute arising out of any express contract entered into with the state of Montana or any agency, board, or officer thereof." Mont. Code Ann. § 18-1-401.

amenable to suit in New York. App. 4-7. It also gave binding effect to this Court's opinion in *Hall* and rejected MBOI's sovereign immunity defense. App. 6. It then engaged in a comity analysis and determined that applying Montana's venue statute (requiring breach of contract cases against Montana be filed in Montana) would offend New York's interests in providing a ready forum to redress injuries "from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of [its] financial markets." *Id.*

9. MBOI seeks a writ of certiorari from this Court on the sole question of whether this Court should overrule its decision in *Nevada v. Hall*, 440 U.S. 410 (1979), and hold that New York *must* yield its sovereignty to a sister State's demand for immunity, and thus, that New York does not have the authority to redress an injury within its borders. The Petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE NEW YORK COURT OF APPEALS APPLIED SETTLED AND CORRECTLY DECIDED PRECEDENT FROM THIS COURT WHEN IT DISMISSED MBOI'S SOVEREIGN IMMUNITY DEFENSE

MBOI concedes, as it must, that its defense of sovereign immunity is squarely foreclosed by this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979). Pet. at pp. 7, 20. In *Hall*, this Court determined that there was no implicit or explicit constitutional authority to support the notion that one sovereign State *must* yield to a demand for sovereign immunity from a co-equal sovereign State. Indeed, the *Hall* Court found that to require such yielding—as a matter of right rather than comity—would constitute an infringement on the sovereignty of the forum State. This reasoning holds true today.

In *Hall*, a plaintiff who had been injured in California in a collision with a car driven by an employee of the University of Nevada, sued the University in a California court. The State of Nevada argued (as MBOI does here) that pursuant to its statute waiving sovereign immunity, the University could only be sued in a Nevada State court, or at the very least, that California must honor Nevada's statutory limits on liability. *Hall*, 440 U.S. at 414. On review, this Court, in a 6-3 opinion, rejected Nevada's demand for sovereign immunity and permitted the suit to proceed in California.

The *Hall* Court recognized that the question of whether a State may claim immunity from suit in the courts of another State was an issue of first impression, and demanded a careful review of the United States Constitution. *Id.*

Both the majority and the dissent in *Hall* noted that while a State was immune from suit in its own Court, because a claim of immunity in a sister State "necessarily implicates the power of and authority of a second sovereign[,] its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.* at 416; *Id.* at 429 (Blackmun, J., dissenting) (agreeing that there must be a constitutional source for Nevada's immunity and that nothing in the explicit text of the Constitution provided for interstate immunity). Both the majority and the dissent in *Hall* agreed that the question of interstate sovereign immunity was "not expressly answered by any provision of the Constitution." *Id.* at 414. This did not end the inquiry, however, because Nevada pressed its argument that there was an *implicit* rule of interstate sovereign immunity based on the common understanding that no sovereign is amenable to suit without its consent. The *Hall* Court searched in vein for such an implicit rule but found none. *Id.* at 421, 425. Specifically, the *Hall* Court held that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case," and further held that the Constitution's Full Faith and Credit Clause did not require California to enforce Nevada's laws in violation of its own public policy. *Id.* at 420-24. The Court concluded that the Constitution "does not confer sovereign immunity on States in the courts of sister states" and that if a federal court—even the United States Supreme Court—forced a state to defer to the laws of another state

"that holding would constitute the real intrusion on the sovereignty of the States." *Id.* at 426-27.

Justices Blackmun, Rehnquist and Chief Justice Burger dissented. Principally, Justice Blackmun lamented that the Court painted with too broad a brush by not restricting jurisdiction to suits arising out of conduct within the forum state, and all of the dissenting Justices argued that interstate sovereign immunity was implicit in the constitutional plan and an essential component of federalism. *Id.* at 430, 437.

MBOI concedes that *Hall* remains binding today, that the New York Court of Appeals was obligated to apply *Hall* in this case, and that it correctly did so when it held that MBOI was not constitutionally immune from suit in the courts of New York for a breach of contract committed in New York. Thus, MBOI does not meet *any* of the enumerated considerations for the granting of certiorari set forth in Supreme Court Rule 10.[2] Rather, it argues that this Court should nonetheless grant certiorari for the purpose of overruling *Hall*. We respectfully submit that there is no compelling reason to revisit *Hall*, let alone to overrule it. Accordingly, the Petition should be denied.

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[2] Generally, this Court will grant a petition for certiorari from a State's highest court only where that court has "decided an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeal," or "has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10.

II. MBOI Is Ill-Suited to Seek Review of *Hall*'s Holding Because It Knew That It Was Not Immune From Suit In New York When It Projected Itself There to Enter Into this Wholly Commercial Contract

It strains credulity that MBOI would seek certiorari to avoid the jurisdiction of the New York courts in a contract dispute where the State of Montana voluntarily entered into a substantial commercial transaction with a New York firm, projected itself into New York to effectuate that transaction, and then breached that contract causing injury in New York. At the time of its actions, MBOI knew full well that it had no immunity from suit in New York. Having chosen to enter New York as a purely commercial actor, rather than an immune sovereign, MBOI is ill-suited now to seek a sea change in the law of interstate sovereign immunity. Indeed, such a change would have the unfair effect of altering retroactively the legal assumptions underlying the parties' contractual relationship.

Specifically, by the time that MBOI entered into this transaction in 2002, *Hall* had been the settled law of this country for over twenty years, and the New York Court of Appeals already had occasion to give full force to *Hall* and consider and deny the defenses of immunity *and* comity in a strikingly similar situation. *See Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 581, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980) (no sovereign immunity or comity afforded to the University of Houston which had engaged in a purely commercial securities transaction with a New York brokerage house). Notwithstanding this clarity in the law, MBOI ventured outside of its borders and entered into this sizable commercial transaction.

Given MBOI's voluntary, wholly commercial conduct in the State of New York, we respectfully submit that this contract case is a poor vehicle for reconsideration of *Nevada v. Hall.* Indeed, any decision by this Court to overrule *Hall*, and then to apply such a new legal rule to the contract formed in this case, would of necessity alter the legal assumptions underlying the parties' contractual relationship, which assumptions were based upon the then-applicable rule of law. Such a result would be unfair and unwarranted in this pure breach of contract action. Furthermore, such a retroactive change would impair countless government contracts by altering the venues and remedies available to various parties with contracts to provide goods and services to the States. For this reason alone, certiorari should be denied.

For two additional reasons, this case presents an inappropriate vehicle through which to reconsider *Hall.* First, since MBOI concedes that Montana has fully waived its sovereign immunity for breach of contract claims brought against it there, *see supra* fn. 1, the question herein presented is strictly one of venue—hardly a compelling State interest. Indeed, even in *Hall*, the objecting State was asserting not only a venue limitation under State law, but a substantive limitation on liability as well. *See Hall*, 440 U.S. at 414. Second, granting certiorari would require this Court to resolve complex issues of Montana State law concerning the extent of Montana's Constitutional and statutory waivers of immunity, and whether those waivers apply to a suit brought in the Courts of the State of New York. *See* Mont. Const. Art. II, Section 18 ("The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a

person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature."); and Montana Code Sections18-1-404 (unconditional waiver of sovereign immunity) and 18-1-401 (venue limitation in actions against the State). These issues were not reached below because MBOI's sovereign immunity defense was clearly foreclosed by *Nevada v. Hall.*

For all of these reasons, certiorari should be denied.

III. THIS COURT HAS REPEATEDLY ACKNOWLEDGED AND RELIED UPON ITS HOLDING IN *HALL*, AND PETITIONER CITES NO SUBSEQUENT OPINION OF THIS COURT—OR OF ANY OTHER COURT—THAT HAS CHALLENGED THE CONTINUING VITALITY, WISDOM OR WORKABILITY OF *HALL*

Hall was correctly decided and remains good law today. In fact, in the over twenty-five years since this Court decided *Hall*, this Court has repeatedly acknowledged its holding in *Hall* and Petitioner cites no opinion of this Court—*or any other Federal court or State court*—which has challenged or even called *Hall* into question. Rather, on several occasions in the last twenty-five years, this Court has restated and relied upon its holding in *Hall*, and State cases have applied *Hall's* holding on sovereign immunity without protest or criticism.

Specifically, in *Alden v. Maine*, 527 U.S. 706 (1999), this Court addressed a fundamentally different question regarding federal-state relations, but expressly acknowledged and endorsed the holding in *Hall.* In *Alden*, this Court considered whether Congress could require the States to permit a federal claim under the Fair Labor Stan-

dards Act to be pressed against the State in State court. This Court held that a State's sovereign immunity protected it from such federal intrusion. The *Alden* Court, however, quoted with approval *Hall*'s sharp distinction between a State's immunity from suit in its own courts, and a State's immunity from suit in the courts of another sovereign, and held that the explanation favoring immunity within a State's own Court did *not* inform the latter situation, stating:

> [B]ut [this explanation] affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.
>
> Since we determined the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another, California was free to determine whether it would respect Nevada's sovereignty as a matter of comity.

Alden, 527 U.S. at 738 (quoting *Hall*, 440 U.S. at 416) (internal quotations and citations omitted).

Foreshadowing MBOI's argument here, the *Alden* Court also distinguished "a State's immunity from suit in federal court from its immunity in the courts of other States." *Id.* at 738-739. The *Alden* Court expressly rejected the notion that its analysis in *Alden* undermined its holding in *Hall*,

and held that there was no inherent conflict between *Alden*'s recognition of an implicit constitutional limit on the federal government's intrusion on the State's sovereignty, and *Hall*'s reluctance to find such a constitutional limit on a forum State's ability to redress an injury from a sister State. The *Alden* Court held:

> Our reluctance to find an implied constitutional limit on the power of the States [in *Hall*] cannot be construed, furthermore, to support an analogous reluctance to find implied constitutional limits on the power of the Federal Government. The Constitution, after all, treats the powers of the States differently from the powers of the Federal Government.
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> ***
>
> Our decision in *Hall* thus does not support the argument urged by petitioners here. The decision addressed neither Congress' power to subject States to private suits nor the States' immunity from suit in their own courts. In fact, the distinction drawn between a sovereign's immunity in its own courts *and its immunity in the courts of another sovereign*, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here—that the Constitution reserves to the States a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress.

Alden, at 739-740 (internal citations and quotations omitted, and emphasis added). Thus, in 1999, the *Alden* Court

found *Hall* to be consistent and supportive of its recent sovereign immunity jurisprudence.

In addition, just three years ago in *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), this Court—in a unanimous decision—applied *Hall* and rejected the invitation of *amici* States to overrule *Hall*. In *Hyatt*, a Nevada resident sued the California taxing authority—in Nevada—for negligent and intentional torts committed in Nevada. Under principles of comity, the Nevada Supreme Court dismissed the negligence based claims but refused to grant California immunity for the intentional torts committed within Nevada.

On certiorari, this Court unanimously affirmed the Nevada Supreme Court by applying the controlling authority of *Hall* and holding that (a) "[t]he State of Nevada is undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts [t]here, which, it is claimed, have injured one of its citizens within its borders," (b) "the Constitution does not confer sovereign immunity on States in the courts of sister States," and (c) Nevada's claim of greater sovereign interest because it was fulfilling its tax function in California was not a reason to diverge from *Hall* because such a rule "would elevate California's sovereignty interests above those of Nevada. . . ." *Hyatt*, 538 U.S. at 498. Therefore, far from undermining the continuing vitality of *Hall*, the *Hyatt* Court unanimously relied upon its earlier holding in *Hall* that States are co-equal sovereigns which cannot be forced to honor a sister State's plea for immunity, because doing so would of necessity diminish the forum State's sovereign interest in providing full redress for injuries within its borders. Significantly, Justice Rehnquist, the author of the

dissent in *Hall* upon which MBOI principally relies, *joined* the unanimous decision in *Hyatt*.

Moreover, in 2000, this Court denied a certiorari petition from Illinois *making the same arguments as does MBOI*. *See McDonnell v. State of Illinois*, 163 N.J. 298, 748 A.2d 1105 (N.J. 2000) (*per curiam*) (request for sovereign immunity and comity did not bar suit against Illinois in New Jersey court), *cert. denied*, *Illinois v. McDonnell*, 531 U.S. 819 (2000) (denying petition for certiorari by the State of Illinois, which had argued that *Alden* undermined *Hall*).

In sum, MBOI has not identified a single opinion of this Court that has questioned the continuing vitality of *Hall*, nor has it pointed to a single decision of any other Federal or State court that has called the wisdom or workability of *Hall* into question. Rather, in the over twenty five years since *Hall* was decided, this Court has embraced and relied upon the essential holding of *Hall* and has categorically distinguished sovereign immunity cases involving federal forums or federal statutes from the decidedly different issue of sovereign immunity in sister States. Because *Hall* remains good law and MBOI has not presented any compelling reason to revisit that decision, we respectfully submit that the petition for certiorari should be denied.[3]

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[3] Moreover, *Hall* is consistent with other decisions from this Court addressing the interstate relationship. *See Pacific Employers Ins. Co. v. Industrial Accident Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501 (1939) (holding in conflicts of law context that "to the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its polity to provide compensation for employees injured in their employment within the state . . . and it must remit him

IV. PETITIONER HAS SET FORTH NO COMPELLING REASON TO SET ASIDE *STARE DECISIS*

Principles of *stare decisis* alone should compel this Court to deny MBOI's Petition. *Stare decisis* is the "basic legal principle commanding judicial respect for a court's earlier decisions and their rules of law." *Randall v. Sorrell*, __ U.S. __, 126 S.Ct. 2479, 2484, 164 L.Ed. 482 (2006). "Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law," *see Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotations and citations omitted), and that "the rule of law demands that adhering to our prior case law be the norm." *Randall*, 126 S.Ct. at 2489; *see also Harris v. United States*, 536 U.S. 545, 556-57 (2002) (plurality opinion) (citing numerous cases).

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to Massachusetts to secure the administrative remedy which that state has provided. We cannot say that the full faith and credit clause goes so far."); *Georgia v. Chattanooga*, 264 U.S. 472 (1924) (a State's eminent domain power can be exercised over a sister State's property in the forum state in part because "[h]aving acquired land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation").

Hall is also consistent with the undisputed notion that New York has a manifest interest in exercising jurisdiction over non-residents who cause harm in New York. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (each state has a "'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors"). Indeed, Montana itself recognizes a "*fundamental*" public policy of protecting "Montana residents from having to litigate outside of Montana," *Keystone, Inc. v. Triad Sys. Corp.*, 292 Mont. 229, 971 P.2d 1240 (1998), and provides for long-arm jurisdiction over non-residents, Mont. R. Civ. Proc. 4B.

Departure from precedent—even in constitutional cases—is exceptional, and requires "special" or "compelling" justification." *Hilton*, 502 U.S. at 202; *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). *Stare decisis* is the expected and preferred course because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity of the judicial process." *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (*quoting Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

These principles are "at their acme" and should be most stringently applied in cases involving matters on which parties rely on this Court's precedent in their business dealings, *i.e.*, cases involving "contract and property rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). *See also Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J., dissenting). In the contract arena, a stable and predictable body of law is essential for parties to negotiate on an even playing field and ultimately receive the benefit of their bargained for transactions.[4] *Stare decisis* is also at its peak where the effects of the Court's decision can be undone by legislative deed, and the Court may be guided by the absence of such action years after a ground-breaking decision. *Shepard v. United States*, 544 U.S. 13, 23 (2005).

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[4] It defies logic how MBOI refers to the holding in *Hall* as a "procedural rule" warranting less deference under *stare decisis*. In its substantive discussions, MBOI posits that the rule in *Hall* is of grave constitutional importance to our system of federalism as well as to each State's inherent sovereign rights—a far cry from a "procedural" rule as it claims in its discussion of *stare decisis*.

MBOI's attempt to avoid *stare decisis* in this case fails. As discussed below (a) public and private parties have relied on *Hall* for over twenty five years, (b) subsequent case law has not rendered *Hall* a "legal outlier" or "legal anomaly" or otherwise "undermined its basic legal principles," as MBOI suggests, and (c) *Hall* has not proved unworkable. Thus, there is simply no reason to disregard the principle of *stare decisis* and revisit *Hall*.

In contrast to MBOI's claims, *Hall* has provided a reliable and stable rule of law that has become part of the fabric of this Court's—and lower courts'—sovereign immunity jurisprudence. Private parties and States have equally understood the implications of *Hall* and for more than twenty five years they have managed their affairs in accordance with *Hall*. Granting certiorari to reconsider *Hall* would dramatically undermine the considerable reliance that States, individuals and corporations have placed upon it in drafting contracts. As this Court held in *Hilton*, "We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us." *Hilton*, 502 U.S. at 202 (holding that *stare decisis* counseled against overruling a 28-year old interpretation of a federal statute where numerous parties and courts had relied upon that definition and Congress had not responded to it).

MBOI argues primarily that *stare decisis* should not preclude review here because the view expressed by the

majority in *Hall* has since been discredited, and the view expressed by the dissenting justices in *Hall* "has turned out to be the majority view." Pet. at 12. Specifically, MBOI argues that "this Court has abandoned *Hall*'s fundamental premise. The Court's jurisprudence now recognizes that a State's immunity from suit without its consent is present in the constitution as part of the plan of the convention, and that it continues to exist as a matter of federal constitutional law in all of the contours in which it existed in 1789 . . . ." Pet. at 14. In support of this argument, MBOI relies principally on the notion that *Hall* is irreconcilable with *Alden v. Maine*, 527 U.S. 706 (1999) and *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002). These cases, however, do not undermine *Hall*, nor do they create any conflict with *Hall*.

The obvious error in MBOI's claim that *Hall* is irreconcilable with *Alden* is plain from (a) the fact that the issue raised in *Alden* was fundamentally different from the issue resolved in *Hall*, and (b) the *Alden* Court's express rejection of the argument that its opinion was inconsistent with its holding in *Hall*. In *Alden*, as discussed above in greater detail, this Court addressed the question of Congressional authority to subject a state to liability in that state's own courts under the Fair Labor Standards Act of 1938. *The entirety of the Court's discussion was directed at the States' immunity from federal intrusion.* In its analysis, the *Alden* Court did nothing to undermine the Court's reasoning or holding in *Hall* and explicitly acknowledged the significant distinction between federal-state relations and interstate relations. *Alden*, 527 U.S. at 738. Indeed, as

quoted above, the *Alden* Court expressly held that *Hall* and *Alden* were consistent with each other.[5]

Similarly, MBOI fails in its attempt to create conflict between *Hall* and *Federal Maritime Commission v. South Carolina State Ports Authority*, 53 U.S. 743 (2002). In that case, this Court considered the authority of the *federal* government to hear suits against a non-consenting State and the Court's decision was directed to the question of sovereign immunity in the context of *federal* intrusion. While this Court spoke in terms of a State's immunity from suit without its consent, it did so regarding federal-state relations—a distinctly different context from the interstate challenge presented here. By again conflating federal-state relations with the issue presented here—interstate relations—MBOI relies erroneously on broad statements of States' immunity from suit in federal court, which statements do not bear on the issue of interstate sovereign immunity.

MBOI also argues that *stare decisis* should not control here because the comity analysis in *Hall* has produced "inconsistent decisions" and "mixed results." Pet. at 21-22. *First*, this argument is misplaced since MBOI does not seek certiorari to review either *Hall*'s holding on the issue of comity, or the New York Court of Appeals' application

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[5] In its attempt to portray a growing body of law advocating absolute State sovereign immunity, MBOI does not refer to the fact that even in the constitutionally commanded realm of federal-state relations, a State's immunity is not absolute because "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 725 (2003).

of that rule in this case.[6] *See* Sup. Ct. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by this Court"). *Second*, there can be no question that other States, as well as New York, have expressed a healthy regard for requests from sister States while holding firm to their own public policies regarding purely commercial transactions. The New York Court of Appeals in *Ehrlich-Bober* expressly acknowledged that immunity may be conferred on sister States in certain cases, such as "where the interest in question goes to the very heart of the governmental function." *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 580-81, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980). In the Court of Appeals' decision in this case, the Court relied on its decision in *Ehrlich-Bober* and held that:

> Here, Montana's legislation serves essentially the same purpose as the Texas statute in *Ehrlich-Bober*—to limit venue rather than liability—and New York's identified interests remain at least as compelling today as in 1980. Thus, we decline to defer to the Montana statute vesting exclusive jurisdiction in the district courts of Montana. We continue to hold that where, as here, a lawsuit arises from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of our financial markets, New York courts should not dismiss the action as a matter of comity. When a more fundamen-

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[6] Indeed, the *amici curiae* expressly state that the comity holding in *Hall* "respects and preserves the sovereignty of the States in the constitutional order," *Amici Curiae* Br. at p.2, n.1.

> tal government interest of another jurisdiction is implicated against a less compelling New York policy, or where there is no material conflict between the two, our courts of course remain open to reasonable deference to the law of another jurisdiction as a matter of mutual respect and interstate harmony.

App. 7.

Indeed, New York's healthy regard for the laws of its sister States was demonstrated in *Crair v. Brookdale Hospital Medical Ctr.*, 94 N.Y.2d 524, 728 N.E.2d 974, 707 N.Y.S.2d 375 (2000), wherein the New York Court of Appeals applied the notice of claim law of a sister State. A similar result was reached in the commercial context in *Salomon Bros., Inc. v. West Virginia State Bd. of Investments*, 152 Misc.2d 289, 575 N.Y.S.2d 993 (NY Sup.), *aff'd*, 168 A.D.2d 384, 563 N.Y.S.2d 714 (N.Y. App. Div. 1990), where a New York court dismissed a declaratory judgment action against the West Virginia State Board of Investments in favor of the West Virginia forum. Other States have also displayed a healthy regard for one another as this Court suggested in *Hall* and *Hyatt*. *See, e.g., Sam v. Sam*, 139 N.M. 474, 134 P.3d 761 (2006) (in a case of first impression, Supreme Court applied *Hall* to an automobile accident in New Mexico and recognized that *Hall* encourages States to extend comity when doing so would not violate the forum State's public policies, and cited New York opinions with approval). Indeed, MBOI does not cite *any* case in which a court has called upon this Court to give further direction to the lower courts to guide their comity analysis, or where the courts have declared the current situation unworkable or rudderless.

Nor is MBOI correct that failure to review and reverse *Hall* harms interstate relations. None of the ominous predictions by the dissenting justices in *Hall* or presented by MBOI have come to fruition in the twenty-five years since *Hall* was decided. Specifically, Justice Blackmun was concerned that "States in all likelihood will retaliate against one another for respectively abolishing the 'sovereign immunity' doctrine[]" and "States' legal officers will be required to defend suits in all other States." *Hall*, 440 U.S. at 429 (Blackmun, J., dissenting). Yet, there have been relatively few cases against a State in the courts of a sister State and, as discussed above, courts have given careful consideration to requests for comity and there have been no reported cases of retaliation between the States. Indeed, notwithstanding the fact that Nevada lost its request for sovereign immunity in the California courts in *Hall*, this Court in *Hyatt* commended the Nevada Supreme Court for "sensitively" applying principles of comity "with a healthy regard for California's sovereign status." *Hyatt*, 538 U.S. at 499. Nor have States been treated by a sister State's court "just as it would any other litigant;" rather, the admonitions in *Hall* and *Hyatt* have guided courts to consider carefully comity requests from sister States.[7] Simi-

[7] MBOI's argument that the New York courts' disrespect for MBOI's sovereign status invited "the kind of unfairness visited on Montana here by the decision of the New York courts to find Montana liable after, in effect, a bench trial by affidavit following incomplete discovery," Pet. at p. 23, has no bearing on the issue. The issue of sovereign immunity was briefed by the parties and no further discovery was sought on this point. Moreover, MBOI's liability was determined pursuant to a traditional summary judgment process which (a) is not presented for review here, (b) the propriety of which has been repeatedly affirmed by this Court, and (c) is a process to which the State of Montana has explicitly consented for suits against it in Montana. *See*

larly, Justice Rehnquist's prediction that "[t]his decision cannot help but induce some 'Balkanization' in state relationships as States try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions," *Hall*, 440 U.S. at 443 (Rehnquist, J., dissenting), has not come to pass. To the contrary, States regularly engage in purposeful commercial transactions—such as in this case—knowing full well that they are not immune from suit in the courts of a sister State.

Thus, with the advantage of twenty-five years since *Hall* was decided, there has not been a crisis of "interstate retaliation that will prove unsettling or upsetting for our federal system," *Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the States have not been so offended by *Hall* that they have entered into interstate compacts to protect themselves from jurisdiction in sister States, and States have not ceased their out-of-state activities. For these reasons, we respectfully submit that this Court should deny MBOI's petition for certiorari under the doctrine of *stare decisis*.

Mont. Code Ann. § 18-1-411 ("In any actions under the provisions of this part, the form of process, writs, pleadings, and motions and the practice and procedure, together with the right of appeal to the supreme court of the state of Montana, shall be the same as if the state of Montana were a private person . . . ."); Mont. R. Civ. Pro. 56 (providing for summary judgment).

V. THE ARGUMENT OF THE AMICI CONCERNING THE *SCHOONER* CASE SHOULD BE REJECTED

Finally, the *amici curiae* assert that *Hall*'s critical flaw is the Court's reliance on *dicta* in *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 7 Cranch, 116 (1812). This novel challenge—which is not raised by MBOI and was not raised by the dissenting justices in *Hall* or by any other opinion of this Court—is without merit.

In *Hall*, the Court referred to *The Schooner Exchange* in which the Supreme Court held that an "American court could not assert jurisdiction over a vessel in which Napoleon, the reigning Emperor of France, claimed a sovereign right." *Hall*, 440 U.S. at 416. The *Hall* Court noted that *Schooner* "makes clear that if California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California . . . . By rejecting the defense in this very case, however, the California courts have told us that whatever California law may have been in the past, it no longer extends immunity to Nevada as a matter of comity." *Hall*, 440 U.S. at 417-418.

The *amici* assert that the Court's reliance on *Schooner* was misplaced, arguing that each State is not an independent sovereign akin to a foreign nation because "the decisions of California's high court are appealable to a court that can require California to conform to interstate rules: the United States Supreme Court." *Amici* Br. at 10-11. This distinction, however, does not undermine *Hall*'s reliance on *Schooner*. Simply put, since the Supreme Court found that there was no consensual or constitutional basis upon which to require one State to yield to a demand for sover-

eign immunity from a co-equal State, and, indeed, that the Supreme Court could *not* require California to respect the immunity demand from Nevada, *see Hall*, 440 U.S. at 426, the appealability of such an opinion to the Supreme Court is not a meaningful distinction to draw. Indeed, the Supreme Court acknowledged as much in its discussion of *Schooner* when it stated:

> Were it an independent sovereign, Nevada might choose to withdraw its money from California banks, or to readjust its own rules as to California's amenability to suit in the Nevada courts. And it might refuse to allow this judgment to be enforced in its courts. But it could not, absent California's consent and absent whatever protection is conferred by the United States Constitution, invoke *any higher authority* to enforce rules of interstate comity and to stop California from asserting jurisdiction. For to do so would be wholly at odds with the sovereignty of California.

Hall, 440 U.S. at 418, n.12 (emphasis added). This coincides with *Hall*'s express acknowledgement that "[n]othing in the Federal Constitution authorizes or obligates this Court to frustrate that policy out of enforced respect for the sovereignty of Nevada." *Id.* at 426.

Moreover, although the *amici* rely exclusively on Judge John M. Rogers' article to support their claim that the Court's reliance on *Schooner* was misplaced, the *amici* fail to refer the Court to the remainder of Judge Rogers' article which makes clear that he *agreed* with the holding in *Hall* and that any error in the Court's reliance on *Schooner* was not fatal to its holding. Judge Rogers wrote that:

> The [*Hall*] majority appropriately distinguished the cases dealing with federal-court jurisdiction over states from the issue of interstate immunity raised by the *Nevada v. Hall* facts. The dissents, in contrast, blurred the distinctions between the two types of immunity and relied on the federal-court jurisdiction cases to argue that the Constitution preserved state immunity in the courts of other states. *A closer look at the theoretical bases asserted for state immunity in the federal courts supports the majority's distinction.*

John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 Duke L.J. 449, 461 (emphasis added). Thus, Judge Rogers found that the Court in *Hall* had come to the "proper judgment."[8] *Id.* at 472. Accordingly, rather than supporting the position of the *amici*, the article relied upon does just the opposite. For this reason as well, the Petition should be denied.

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[8] In reaching this conclusion, Judge Rogers relied in part on an analogy to international law. He noted that the result in *Hall* was supported by principles of international law because a foreign sovereign is not immune for claims arising from tortious activity (such as in *Hall*) or from "'commercial activity' having a nexus with the United States." *Id.* at 473-74 (*citing* 28 U.S.C.A. § 1605(a)(2) of the Foreign Sovereign Immunities Act). The same analogy to international law would hold true here, as MBOI was plainly acting in a purely commercial capacity.

CONCLUSION

For the reasons set forth above, we respectfully request that this Court deny MBOI's Petition for certiorari.

Dated: November 6, 2006

Respectfully submitted,

Larry H. Krantz
Counsel of Record
KRANTZ & BERMAN LLP
757 Third Avenue, 25th Floor
New York, New York 10017
Attorneys for Respondent

Wendy E. Gerstmann
Of Counsel

REPLY BRIEF

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MONTANA BOARD OF INVESTMENTS,

Petitioner,

v.

DEUTSCHE BANK SECURITIES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

MIKE MCGRATH
Attorney General
CHRISTIAN D. TWEETEN
Chief Civil Counsel
Counsel of Record
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
Attorneys for Petitioner

November 17, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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REPLY ARGUMENT

The Brief in Opposition is remarkable as much for what it does not say as for what it does. The Brief does not suggest that the Court lacks jurisdiction over the Petition, *cf.* Petition at 1-2. The Brief does not dispute Petitioner Montana Board of Investments' ("MBOI") showing that this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), rested on the premise that, insofar as the Constitution is concerned, the sovereign immunity of the states extended no farther than the Eleventh Amendment, *cf.* Petition at 11-12. The Brief does not deny that this premise has been discarded by the Court in its more recent jurisprudence, *cf.* Petition at 14-20.

Thus much of the justification for granting the writ as shown in the Petition stands unrebutted. As shown below, the arguments Deutsche does advance are supported by neither law nor logic.

1. Respondent Deutsche Bank Securities Inc. ("Deutsche") reiterates its assertion in the courts below that this Court has "repeatedly acknowledged and relied upon its holding in *Hall*." Brief in Opposition at 11. The "repeated acknowledgment and reliance," according to Deutsche, occurred in the two decisions MBOI distinguishes in the petition, *Alden v. Maine*, 527 U.S. 706 (1999) and *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), Petition at 16, 26, and in *Illinois v. McDonnell*, 531 U.S. 819 (2000), in which Deutsche asserts the Court denied certiorari in a case in which Illinois presented the same question presented here.

In its discussion of *Alden*, Deutsche knocks down a straw man. MBOI never asserted that *Alden* ***overruled*** *Hall*'s narrow sovereign immunity holding. MBOI argued

a different point – that *Alden* lays out a constitutional plan regarding state sovereign immunity that is inconsistent with the one that provided the foundation for *Hall*. A case stands as precedent for both its narrow holding and for the underlying reasoning necessary to support it. *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.") MBOI has demonstrated that the reasoning underlying *Hall*, reasoning that was necessary to the decision in that case, is fundamentally inconsistent with the later cases, and Deutsche has failed to show otherwise.

Accordingly, Deutsche's assertion that the Court "held that there was no inherent conflict" between *Alden* and *Hall*, Brief in Opposition at 13, proves nothing. Deutsche's quotation from *Alden* in the Brief in Opposition at 13 discloses this Court's holding that the cases are distinguishable. Deutsche concedes this point in the Brief in Opposition at 19 ("the issue raised in *Alden* was fundamentally different from the issue resolved in *Hall*. . . . "), in effect supporting MBOI's argument that *Alden* cannot be read as a reaffirmation of *Hall*. *Cf. United States v. Neifert-White Co.*, 390 U.S. 228, 231 (1968) ("[L]anguage in the Court's opinion . . . cannot be taken as a decision upon a point which the facts of the case did not present.") The same flaw undercuts Deutsche's discussion of *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), Brief in Opposition at 20.

Deutsche's treatment of *Franchise Tax Board* is even more transparently incorrect. As pointed out in the Petition at 26, the Court expressly relied on *Hall* ***without*** reexamining its soundness because no party had requested the Court to reconsider *Hall*. 538 U.S. at 497. It is fundamental

that this Court's decisions stand as precedent only for questions properly presented and actually decided. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, . . . and such assumptions . . . are not binding in future cases that directly raise the questions.")

For its asserted "repeated reaffirmation" argument Deutsche is thus left to lean on the slenderest of reeds – the suggestion that the denial of certiorari in *McDonnell* should be considered precedent for *Hall*'s soundness. Brief in Opposition at 15. The principle that a denial of certiorari carries no precedential weight is firmly established. *Teague v. Lane*, 489 U.S. 288, 296 (1989), *quoting United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.) ("[D]enial of a writ of certiorari imports no expression of opinion upon the merits of the case.") Deutsche's reference to *McDonnell* thus adds nothing to its argument.

2. Deutsche asserts that MBOI "is ill-suited" to challenge *Hall* in this case because "it knew that it was not immune from suit in New York when it projected itself there to enter into this wholly commercial contract." Brief in Opposition at 9. Deutsche asserts that reconsideration of *Hall* in this case would "alter the legal assumption underlying the parties' contractual relationship" and would further "impair countless government contracts by altering the venues and remedies available to various parties with contracts to provide goods and services to the States." *Id.* at 10.

The first problem with these arguments is that they have no support in the record. Deutsche was aware from the outset of this litigation that MBOI asserted its sovereign immunity. It nevertheless included no information in any of the affidavits it filed in the trial court to suggest the extent to which the parties even considered the availability of a New York venue in arriving at their contract. Given that Deutsche initiated and concluded the deal within a matter of less than two hours without any signed written contract, the suggestion that its conduct was somehow premised on the ability to sue Montana in New York is far-fetched.

As far as other contracting parties are concerned, supporting evidence is similarly lacking. The Court can take judicial notice that venue provisions are routinely negotiated in commercial contracts. Since Deutsche bargained for no such provision here, this case presents no occasion to decide whether by agreeing to such a clause a state waives any sovereign immunity it has.

This argument boils down to an assertion that Montana waived whatever immunity it might have by its conduct in this case. The argument should be rejected because it contravenes a fundamental rule in sovereign immunity cases – that any waivers of state immunity must be clearly expressed. *See College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, 527 U.S. 666, 683-84 (1999) (States may not be held to have constructively waived sovereign immunity by "conduct that the State realistically could choose to abandon, that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants.'") The record here is devoid of evidence that could support a

finding that Montana clearly expressed an intention to waive its immunity by entering into the contract at issue in this case.

3. Deutsche argues that the Court should deny the writ out of respect for principles of stare decisis.

a. It first characterizes this case as one involving "contract and property rights" and asserts that stare decisis applies most strongly in the context of commercial transactions because of the asserted reliance by States and contracting parties on the *Hall* rule. Brief in Opposition at 17. Deutsche cites this Court's decision in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991). In *Hilton* the Court refused to disturb one limited aspect of its prior holding in *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), *viz.*, that Congress intended the Federal Employer Liability Act and the Jones Act to create a state court cause of action by injured workers against a state-owned railroad.

Hilton does not help Deutsche. The Court has shown no reluctance to reconsider precedent in the sovereign immunity context when the precedent is fundamentally flawed, even in cases involving a plaintiff's commercial conduct. Subsequent to *Hilton* the Court overruled whatever remained of *Parden* in *College Savings Bank*, 527 U.S. at 680; *see Alden*, 527 U.S. at 732 (*Parden*'s holding that Congress subjected states to suit under its Article I powers overruled in *College Savings Bank)*; *see also Seminole Tribe*, 517 U.S. at 66, *overruling Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In *College Savings Bank*, the Court considered and rejected Deutsche's argument that States are somehow less sovereign for immunity purposes when they engage in commercial or other activities that are

not core sovereign functions. 527 U.S. at 683-84 ("Since sovereign immunity itself was not traditionally limited by these factors, and since they have no bearing upon the voluntariness of the waiver, there is no principled reason why they should enter into our waiver analysis.")

Moreover, the aspect of *Parden* reaffirmed in *Hilton* was a matter of statutory interpretation, not a rule of constitutional law. In statutory interpretation cases stare decisis principles are at their strongest. *Hilton*, 502 U.S. at 202, *quoting Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.") The *Hilton* Court observed that numerous state legislatures had exempted railroad employees from coverage under state workers' compensation acts, and that overruling this aspect of *Parden* would leave state rail workers without a remedy and require extensive legislative response from the states. *Id.* at 202-03.

None of these considerations apply here. *Hall*'s sovereign immunity rule is a matter of constitutional law, not statutory interpretation. Neither Congress nor the state legislatures could reverse *Hall*, and the record contains nothing to suggest that its overruling would upset any important reliance interests.

b. Deutsche disputes MBOI's argument that *Hall* has spawned significant litigation producing inconsistent results. First, Deutsche asserts that MBOI cannot argue this point because it did not seek review of the lower

courts' comity holding. Stare decisis analysis unquestionably has encompassed the inquiry as to whether the rule in issue has proven difficult to apply. *See, e.g., Nichols v. United States*, 511 U.S. 738, 746 (1994) (difficulty in application of prior ruling "is itself reason for reexamining [a] decision.") Thus Deutsche cannot be heard to argue that the inconsistent application of the *Hall* sovereign immunity rule is not "fairly included" within the question presented in the Petition. Sup. Ct. R. 14(a) ("The statement of any question is deemed to comprise every subsidiary question fairly included therein.")

In advancing this argument Deutsche misleadingly suggests that the amicus brief of the Commonwealth of Virginia conceded that "the comity holding . . . 'respects and preserves the sovereignty of the States in the constitutional order.'" Brief in Opposition at 21 n. 6, *quoting* Brief of the Commonwealth of Virginia et al. at 2 n. 1. In fact, the amicus brief addressed that comment to a much narrower portion of *Hall*, not implicated here, in which the Court held that the Full Faith and Credit Clause did not compel Nevada to apply California ***statutory*** law in the litigation of Hall's claim.

Deutsche next claims that the States in applying *Hall* "have expressed a healthy regard for requests from sister states while holding firm to their own public policies regarding purely commercial transactions." Brief in Opposition at 21. First, the only cases Deutsche cites regarding the application of the *Hall* rule to "purely commercial transactions" are this one and the New York Court of Appeals decision on which the court below relied. Second, Deutsche does not dispute that state courts have not consistently applied *Hall*'s comity rule with respect to identifying the relevant state policy to be considered.

Deutsche in effect concedes that even the New York Court of Appeals has failed in this regard, citing the court's decision in *Crair v. Brookdale Hospital Medical Center*, 94 N.Y. 2d 524, 728 N.E. 2d 974 (2000), in which the Court of Appeals referred to New York's limited waiver of sovereign immunity as the appropriate state policy, in contrast with this case in which the court ignored New York's sovereign immunity policy in favor of an ill-defined court-created policy favoring the interests of New York financial markets. Finally, Deutsche asserts that no state has sought further guidance from this Court as to the comity analysis, ignoring the Court's decision three years ago in *Franchise Tax Board*, a case in which California sought precisely such assistance.

Deutsche finally glides past the argument that *Hall*'s comity analysis leaves states at each other's mercy with respect to the fairness of litigation procedures. In responding to MBOI's argument that comity left the New York courts free to treat MBOI unfairly, Deutsche falsely states in footnote 7 of the Brief in Opposition that MBOI sought no further discovery with respect to the summary judgment motion. This is simply an untruth, as both the majority and dissenting opinions below show. *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 7 N.Y. 3d 65, 74, 850 N.E. 2d 1140 (2006) (holding that "the Appellate Division did not abuse its discretion in rejecting MBOI's request for additional discovery"); *id.* at 75-77 (*Read, J., dissenting*) (Appellate Division erred in denying request for further discovery). Deutsche's description of the process below as a "traditional summary judgment process" rings hollow in light of the limitations on discovery approved by the New York appellate courts, including their refusal to permit any depositions.

But Deutsche misses the real point here. It is unrebutted that the *Hall* comity rule lacks workable standards to guide the discretion of courts in fifty states which have already shown that they cannot arrive at a consistent understanding of what the rule requires. Stare decisis simply does not require reaffirmation of a rule that has proven flawed in both theory and practice.

4. Deutsche's argument in response to the amicus brief of the Commonwealth of Virginia et al. regarding the *Hall* Court's treatment of *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) fails to show grounds to deny the writ. Virginia argues that the *Hall* Court erred in its reliance on *The Schooner Exchange* because it improperly analogized the Supreme Court's recognition of the sovereign immunity of nations, which must rely solely on comity since it is not commanded by any higher enforceable law, with the recognition of state sovereign immunity in a state court, which is always subject to the commands of the Constitution and enforceable by review in this Court. *See* J. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 Duke L.J. 449, 465-67 (1981). Deutsche's response begs this question, assuming the correctness of all other aspects of *Hall* and then asserting in effect that the discussion of *The Schooner Exchange* in *Hall* is mere makeweight. MBOI agrees with Virginia's argument, but even if Virginia is wrong the petition should be granted to review *Hall* in light of its reliance on the now-discredited proposition that state sovereign immunity lacks a constitutional foundation.

5. Deutsche suggests that the Petition fails to state grounds for the writ under Supreme Court Rule 10 because MBOI "concedes" that the courts below were obligated to

follow *Hall*. Brief in Opposition at 8. If this argument carried any force, the Court could never grant a petition squarely seeking reconsideration of one of its prior precedents. Rule 10 states that the "character of the reasons the Court considers" includes the situation in which a lower court "has decided an important question of federal law that has not been, but should be, settled by the this Court. . . . " Forty-two states and the Commonwealth of Puerto Rico have joined Montana in asking this Court to reconsider *Hall*. The question presented in the Petition – whether *Hall*'s sovereign immunity holding should be overruled – is precisely the kind of important unresolved issue that merits review under the Rule 10 standard.

CONCLUSION

For the foregoing reasons and those expressed in the Petition, Petitioner respectfully prays that the writ issue.

Respectfully submitted,

MIKE MCGRATH
Attorney General
CHRISTIAN D. TWEETEN
Chief Civil Counsel
Counsel of Record
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
Attorneys for Petitioner